Supreme Court, U.S.
FILED
FEB 8 1999
OFFICE OF THE CLERK

(3)

No. 98-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER MILTON SONNEBERG'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Milton Sonneberg is incarcerated, his freedom deprived on the basis of an invalid theory of criminal liability. Yet the

government argues that this case "would not be an appropriate vehicle" to resolve the applicability of this untenable theory. (U.S. Br. 6). The government maintains this position in the face of the federal courts' apparent need for guidance from this Court, as reflected by a conflict in the circuits and recent decisions by district courts that do not comport with the government's view of the state of the law. The last statement by this Court on the issue raised by this case strongly suggests that petitioner's conviction cannot stand. The government's formulation of the applicable legal standard has never been endorsed by this Court. If, in fact, "[t]he case law has long held that the mail and wire fraud statutes reach beyond common law fraud, and in particular, may reach omissions even in the absence of a fiduciary or regulatory duty to disclose" (U.S. Br. 10), this Court has not so stated.

1. The government opposes the petition, arguing that the requirement of a duty to disclose that is found in *Chiarella v. United States*, 445 U.S. 222 (1980), is inapplicable to the mail and wire fraud statutes because they "are not limited to matters that would be punishable as common law fraud." (U.S. Br. 7). Whether this may be true in certain circumstances, the cases upon which the Solicitor General relies have little to do with the issue presented in this Petition. *See Durland v. United States*, 161 U.S. 306 (1896); *United States v. Moore*, 37 F.3d 169 (5th Cir. 1994); *United States v. Stewart*, 872 F.2d 957 (10th Cir. 1989); *United States v. Bishop*, 825 F.2d 1278 (8th Cir. 1987). Those cases simply recognize that where the common law has been preempted by Congress, the legislative intent controls. But here, where there is no indication that Congress intended for the mail and wire fraud statutes to encompass mere nondisclosures, the common law remains instructive. *See United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996) (recognizing that "long-established common-

law fraud concepts inform -- but do not control -- our discussion. . .especially in light of the requirement that federal criminal statutes be interpreted narrowly . . ."). Accordingly, as *Brown*, and *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) recognize, the fact that *Chiarella* sounds in the common law is irrelevant. *Chiarella* remains compelling precedent for this Court's construction of the mail and wire fraud statutes. *See also United States v Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (applying *Chiarella*'s duty to disclose requirement to false statements under 18 U.S.C. §1001); *United States v. Irwin,* 654 F.2d 671, 678-79 (10th Cir. 1981) (same).

In support of its proposition that the mail fraud statute is "broader" than the common law and encompasses mere omissions, the government cites several cases that purport to uphold the imposition of criminal liability for nondisclosure. In each of these cases, however, the omission that was held to be criminally fraudulent was accompanied by either (1) a misleading half-truth, (2) an affirmative concealment of the truth, or (3) the presence of a fiduciary-type relationship. In not one of these cases was the defendant convicted merely for failing to disclose information, as Petitioner was in this case.

In *United States v. Riebold*, 135 F.3d 1226 (8th Cir), *cert. denied*, 118 S.Ct. 2356 (1998), the court of appeals found that the defendant had affirmatively *concealed* his criminal past by denying that he had ever been to prison (he had in fact been sentenced to serve five years), and told a *misleading half-truth* when he represented that he had only one fraud conviction (he had two). Thus, Riebold was not convicted for his mere failure to disclose his prior convictions; rather, he was convicted for deliberately lying and misleading investors who asked about his past. Moreover, Riebold stood in a much

different relationship with the investors than Petitioner: investors entrusted their money *with* Riebold, and relied on *his* discretion, honesty, integrity and business acumen. No investor in this case similarly entrusted Petitioner; they knew that he was a mere salesman and just a conduit to their ultimate investment. The other cases relied on by the government are similarly distinguishable. *United States v. Moore*, 37 F.3d. 169 (5th Cir. 1994) (defendants sold land and conveyed a deed *misrepresenting* good and clear title when in fact an outstanding mortgage was held on the property); *United States v. Keplinger*, 776 F.2d 678, 698 (7th Cir. 1985) (defendant research company submitted fraudulent report to the FDA which *concealed* test results that revealed that its drug had harmful side-effects). In fact, the only cases cited by the government that deal with individuals who were convicted merely for omitting to disclose certain information resulted in the convictions being reversed.[1] *Chiarella v. United States*, 445 U.S. 222 (1980); *United States v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997); *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996).

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[1] Nothing in *Riebold*, *Moore*, and *Keplinger* affects Petitioner's argument that the rule of lenity and his due process rights were violated. Those cases involved only affirmative misrepresentations and active concealments of the truth. Therefore, they could not have provided notice to Petitioner that his failure to disclose would be criminal. Moreover, the Solicitor General has failed to address Petitioner's due process argument that under the securities law statutes, individuals such as Petitioner were not obligated to disclose their prior criminal activity. *See* 17 C.F.R. § 229.401(f); Schedule 14A, 17 C.F.R. § 240.14a-101.

The government contends that there is no split in the circuits on this issue, as neither *Brown* nor *Cochran* have adopted *Chiarella*'s holding that there can be no criminal liability for a failure to disclose "absent a duty to speak." Even if this were true, it would be immaterial. The importance of this issue to the entire federal criminal system is such that even in the absence of a split, this Court should grant certiorari in order to settle this vital issue of law. Sup. Ct. R. 10(c). Moreover, the Third Circuit's affirmance of Petitioner's conviction violates the holding and the spirit of *Chiarella*. Sup. Ct. R. 10(c).

But this case raises an issue on which there is a split in the circuits. Contrary to the Solicitor General's view, there can be little question that *Brown* and *Cochran* dealt with individuals, such as Petitioner, who were under no duty to reveal information to their "victims," but nonetheless were convicted for failing to disclose. The convictions in *Brown* and *Cochran* were overturned because the Tenth and Eleventh Circuits, relying on *Chiarella*, found that a conviction for nondisclosure could not stand absent a duty to disclose. Despite the Solicitor General's claim to the contrary, there can be no doubt that the *Cochran* panel held the government to *Chiarella*'s standard, as the opinion focused on the absence of a duty to disclose. After noting that no "statute, regulation, common law or contractual provision" created such a duty, the Court then looked to *Chiarella* to see if the relationship between *Cochran* and the alleged victim gave rise to a duty to disclose. *Cochran*, 109 F.3d at 665 ("While a fiduciary relationship is not an essential element of a wire fraud prosecution, it can trigger a duty of disclosure as can some other relationship of trust and confidence between the parties") (citing *Chiarella*, 445 U.S. at 228). Ultimately, of course, *Cochran* found that no such relationship existed. *Id.*

The Solicitor General similarly attempts to distinguish *Brown*, claiming that the court reversed defendants' convictions only because there was no evidence that the misrepresentations at issue were material. But there, the Eleventh Circuit only considered the issue of materiality of the defendants' *misrepresentations* after determining that absent a duty to disclose, the conviction could not stand on omissions alone. *Brown*, 79 F.3d at 1558. The government's attempt to distinguish *Brown* -- because, unlike this case, the undisclosed information could "readily" be discovered by a prudent person -- is belied by the record. (U.S. Br. 10). Any of the investors in this case could have simply asked Petitioner about his past, or done some basic research. But as the record shows, no investor ever asked Petitioner, who was after all only a salesman, about his past.[2]

Finally, the Solicitor General argues that, even if *Chiarella* does apply to the mail and wire fraud statutes, certiorari is still not warranted here because the indictment also charged that Petitioner made other false and misleading statements that *could* have formed the basis for his conviction. This argument turns this Court's decisions in *Yates v. United States*, 354 U.S. 298 (1957), and *Griffin v. United States*, 502 U.S. 46 (1991), on their heads. Whether there was an alternative legal theory upon

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[2] The Solicitor General intimates that Petitioner's occasional use of the name Sonny Hill somehow mislead investors into believing that he did not have a criminal past. But the record clearly shows that this was not the case, Petitioner only sporadically used the name Sonny Hill during the time that he was selling the wireless deals that formed the first half of the indictment, and not at all when he was selling L.L.C. interests in the radio stations described in the indictment's second half.

which the government's prosecution could have been based is irrelevant. The fact remains that it is "impossible to tell" if the jury convicted Petitioner on the deficient legal theory; accordingly, reversal is required. Even a cursory review of the record indicates that Petitioner's failure to disclose to investors his prior conviction formed the backbone of the government's case. It was prominently featured in the indictment, repeated incessantly during opening statements, formed an important part of nearly every direct examination, and was the central theme of the government's closing argument and rebuttal. It was even highlighted by the District Court as a viable theory of prosecution during its supplemental charge to the jury. For the Solicitor General to now suggest that there is "no reasonable possibility" that the jury in this case convicted Petitioner for failing to disclose his prior conviction, simply ignores how the government and the trial judge presented this case to the jury.[3]

2. The Solicitor General also argues that no error was committed by the district court in forbidding the defendant to play for the jury excerpts of tape-recorded prior inconsistent statements of the government's star witnesses. Although the government acknowledges that there is a split in the Courts of Appeals concerning whether evidence of a prior inconsistent

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[3] The Solicitor General's argument that the Court's instruction that the scheme to defraud must be proved "substantially as charged" is a meaningless one. The prosecution ensured that the jury viewed Petitioner's failure to disclose as the essence of the crime charged in the indictment. To follow the Solicitor General's suggestion that the District Court's use of "substantially as charged" language in its instructions somehow ameliorated the fact that the government and court presented this case to the jury as a nondisclosure case would render *Yates* meaningless.

statement may be admitted into evidence after the witness admits making the statement, it nonetheless argues that review is not warranted in this case. It argues that the Petitioner was not prejudiced because his lawyer was able to read from the transcripts of the tapes during cross-examination of the witnesses. This ignores, however, the fact that upon acknowledging making the statements contained on the tapes, the witnesses immediately downplayed their significance by saying that they were only "joking" and that the statements were made "in jest." In these circumstances, forbidding the defendant to present the best evidence of these powerfully exculpatory statements violated the principles of *Gordon v. United States*, 344 U.S. 414 (1953), and requires review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

February 1999

Respectfully submitted,

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